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Protecting Europe beyond its Borders: The Agreements between Europol and Third States or International Organizations

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SUMMARY: 1. Introduction. 2. The role of Europol in the development of the external dimension of the AFSJ. 3. The operational agreements between Europol and third States. 4. The strategic agreements between Europol and third States. 5. The operational and strategic agreements between Europol and international organizations. 6. Conclusion.

ABSTRACT: Under Article 3(2) of the Treaty on the European Union, the Union shall offer its citizens an area of freedom, security, and justice without internal frontiers, in which the free movement of persons is ensured in conjunction with appropriate measures with respect to external border controls, asylum, immigration, and the prevention and combating of crime. The objective is paramount, especially as far as the fight against transnational crime is concerned. Over time, experts have stressed that the protection of the EU and the Member States must be guaranteed not only inside European borders but also outside Europe in order to be effective: Thus, forms of cooperation with non-European States and other international organizations are strongly needed. Then, the article focuses on one of these forms of cooperation: The operational and strategic agreements concluded by Europol with third countries and international organizations. An overview of the content of the agreements is provided and an assessment is made so as to understand whether these kinds of agreements actually enhance the role played by the European Union on the global stage while effectively protecting human rights at the same time.

KEY WORDS: Area of Freedom, Security, and Justice; External Dimension of the Area of Freedom, Security, and Justice; Europol; operational agreements; strategic agreements; protection of human rights.

1. Introduction

The economic realities that have favoured the overcoming of restrictions on economic and financial transactions and the expansion of global markets, globalization¹ and the

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1 See generally BECK, U. *Was ist Globalisierung? Irrtümer des Globalismus – Antworten auf Globalisierung*. Suhrkamp, 1997, BECK, U. *Der kosmopolitische Blick oder: Krieg ist Frieden*. Suhrkamp, 2004, SASSEN, S. *A Sociology of Globalization*. Norton, 2007. On the relation between globalization and law, see WIENER, J. *Globalization and the Harmonization of Law*. Pinter, 1999, DAVID, P.R. *Globalización, prevención del delito y justicia penal*. Zabalia, 2004, BOULLE, L. *The Law of Globalization. An Introduction*. Wolters Kluwer, 2009, CASSESE, S. *Il diritto globale. Giustizia e democrazia oltre lo Stato*. Einaudi, 2009, WOJTYCZEK, K. "La mondialisation et les mutations du droit constitutionnel", *European Review of Public Law*, 22, P.149. On the relation between globalization and criminal law, see NOWAK, C. "European Union criminal law – a laboratory of internationalization of

creation and development of the European internal market² have marked our recent history and led to some positive outcomes: In fact, they have improved the living conditions of people living in Western countries. However, there are some negative features which should be taken into account, too. As a matter of fact, the technological development they have been largely based upon - think for instance of forms of development regarding telecommunications, IT, or means of transportation, just to name a few - has also determined the rise of new criminal realities. It is no coincidence that the concept of transnational crime has come into existence³ and actually, the legal doctrine has acknowledged the existence of a fifth fundamental freedom in the European Union's (EU) political, economic, and social framework: Free movement of crime.⁴ That is what stands behind the creation of the area of freedom, security, and justice (AFSJ) as a key objective of the EU.⁵

Pursuant to Article 3(2) of the Treaty on the European Union (TEU), "the Union shall offer its citizens an area of freedom, security, and justice without internal frontiers, in which the free movement of persons is ensured in conjunction with appropriate measures with respect to external border controls, asylum, immigration, and the prevention and combating of crime."⁶ This objective is paramount, as one can easily understand by simply checking the

law". *Fight against EU fraud. Administrative and criminal law issues* (Ed.) Nowak, C. Lex, 2011, BERNARDI, A. "Il diritto penale tra globalizzazione e multiculturalismo", *Rivista italiana di diritto pubblico comunitario*, 12, P.485-534.

2 See *The Law of the Single Market: Unpacking the Premises* (Eds.) Barnard, C. and Scott, J. Hart Publishing, 2002, *Regulating the Internal Market* (Ed.) Nic Shuibhne, N. Edward Elgar, 2006, EGAN, M. "Single Market". *The Oxford Handbook of the European Union* (Eds.) Jones, E., Menon, A. and Weatherhill S. Oxford University Press, 2012, BARNARD, C. *The Substantive Law of the EU: The Four Freedoms*. Oxford University Press, 2013.

3 Under Article 3(2) of the United Nations Convention against Transnational Organized Crime, an offence is transnational in nature if: a) it is committed in more than one State, b) it is committed in one State but a substantial part of its preparation, planning, direction or control takes place in another State, c) it is committed in one State but involves an organized criminal group that engages in criminal activities in more than one State, or d) it is committed in one State but has substantial effects in another State. On this topic, see *Transnational Organised Crime* (Eds.) Edwards, A. and Gill, P. Routledge, 2003, PECCIOLI, A. *Unione europea e criminalità transnazionale. Nuovi sviluppi*. G. Giappichelli editore, 2005, *Handbook of Transnational Crime and Justice* (Ed.) Reichel, P. Sage Publication, 2005.

4 One may find the phrase "fifth freedom" in SPENCER, J.R. "EU Criminal Law – the Present and the Future?". *A Constitutional Order of States? Essays in EU Law in Honour of Alan Dashwood* (Eds.) Arnall, A., Barnard, C., Dougan, M. and Spaventa, E. Hart Publishing, 2011, P.343. Also, one should consider that someone speaks of "free movement of prosecutions" and calls for "free movement of criminal justice": see PEERS, S. *EU Justice and Home Affairs Law*. Longman, 2000.

5 This has been an objective of the EU since the 1997 Treaty of Amsterdam. One could find references to it in the Preamble and under Articles K.1 and B of the former Treaty on the European Union, as well as under Article 73 I of the Treaty establishing the European Communities. For an introduction, see *Europe's Area of Freedom, Security and Justice* (Ed.) Walker, N. Oxford University Press, 2004, *Lo spazio di libertà, sicurezza e giustizia dell'Unione europea: principi fondamentali e tutela dei diritti* (Eds.) Draetta, U., Parisi, N. and Rinoldi, D. Editoriale Scientifica, 2007, *The Institutional Dimension of the European Union's Area of Freedom, Security and Justice* (Ed.) Monar, J. Peter Lang, 2010, ECKES, C. and KONSTADINIDES, T. *Crime within the Area of Freedom, Security and Justice: A European Public Order*. Cambridge University Press, 2011.

6 The specific provisions may be found under Title V of the Treaty on the Functioning of the European Union (Articles 67-89) which tackles issues such as border checks, asylum, and immigration (Chapter 2), judicial cooperation in civil matters (Chapter 3), judicial cooperation in criminal matters (Chapter 4), and police cooperation (Chapter 5).

wording of Article 3. The attainment of the AFSJ precedes the establishment of the internal market (paragraph 3) and the economic and monetary union (paragraph 4). Also, one should consider Article 67(3) of the Treaty on the Functioning of the European Union (TFEU), which states that "the Union shall endeavour to ensure a high level of security through measures to prevent and combat crime, racism, and xenophobia, and through measures for coordination and cooperation between police and judicial authorities and other competent authorities, as well as through the mutual recognition of judgments in criminal matters and, if necessary, through the approximation of criminal laws."

So, the EU aims at solving these issues by taking measures which are adequate to their gravity. However, over time, experts have become aware that the effective protection of the EU and the Member States cannot be guaranteed solely and exclusively in Europe: Forms of cooperation with non-European States and other international organizations are needed as they should be regarded not only as economic partners, but also and most importantly as allies in a global struggle. This has led to the identification of the so-called external dimension of the AFSJ,⁷ whose function is noteworthy - yet ancillary to the establishment of the internal AFSJ. In fact, the external dimension of the AFSJ should facilitate the promotion of the EU's democratic values and create a secure environment outside the European borders that the EU, the Member States, and third States could benefit from⁸

This topic has been of prime importance since the European Council which took place in Tampere in October 1999. On that occasion, the European Council underlined that all competences and instruments at the disposal of the EU, and in particular, in external relations, should be used in an integrated and consistent way to build the AFSJ, and expressed its support for regional co-operation with non-EU States (especially Baltic countries and Balkan countries) against organised crime⁹.

7 For an introduction, see *Sécurité et justice: Enjeu de la politique extérieure de l'Union européenne* (Eds.) de Kerchove, G. and Weyembergh, A. Éditions de l'Université libre de Bruxelles, 2003, PAWLAK, P. "The External Dimension of the Area of Freedom, Security and Justice: Hijacker or Hostage of Cross-pillarization?", *European Integration*, 31, P.25-44, MONAR, J. *The External Dimension of the EU's Area of Freedom, Security and Justice. Progress, Potential and Limitations After the Treaty of Lisbon*. Swedish Institute for European Policy Studies, 2012, MONAR, J. "The EU's Growing External Role in the AFSJ Domain: Factors, Framework and Forms of Action". *Supranational Governance of Europe's Area of Freedom, Security and Justice* (Eds.) Kaunert, C., Occhipinti, J.D. and Léonard, S. Routledge, 2015, P.109-128. For what concerns the fight against transnational crime, see MITSILEGAS, V. "The External Dimension of EU Action in Criminal Matters", *European Foreign Affairs Review*, 12, P.457-497 REES, W. "Inside Out: The External Face of EU Internal Security Policy" *Journal of European Integration*, 30, P.97-111, LAVENEX, S. and WICHMANN, N. "The external governance of EU internal security", *Journal of European Integration*, 31, P.83-102. With regard to the relation between the external dimension of the AFSJ and the Common Foreign and Security Policy, see CREMONA, M. *EU External Action in the JHA Domain: A Legal Perspective*. European University Institute, 2008. For an introduction to the EU external action, see VAN VOOREN, B. and WESSEL, R.A. *EU External Relations Law: Text, Cases and Materials*. Cambridge University Press, 2014.

8 Council of the European Union, "European Union priorities and policy objectives for external relations in the field of justice and home affairs", Document no. 7653/00 and "A Strategy for the External Dimension of JHA: Global Freedom, Security and Justice", Document no. 15446/05.

9 European Council, Conclusions of the Presidency of the European Council, Tampere, 15-16 October 1999, available at http://www.europarl.europa.eu/summits/tam_en.htm (accessed 1 July 2016).

In the Hague Programme, the European Council defined the development of a coherent external dimension of the EU policy of freedom, security, and justice as a growing priority, especially with regard to the fight against terrorism¹⁰.

In the Stockholm Programme, the European Council stressed the need to engage with third countries to combat serious and organized crime, terrorism, drugs, trafficking of human beings, and smuggling of persons by primarily focusing the EU's counter-terrorism activities on prevention, protecting critical infrastructures, and exchanging information with third countries. Some key partners were singled out: They were candidate countries, countries with an EU membership perspective, European neighbourhood countries, European Economic Area/Schengen States, the United States of America, the Russian Federation, and other countries or regions of priority, as well as international organizations such as the United Nations and the Council of Europe.¹¹

In the Conclusions of the Ypres European Council, one can find further references to the EU's role as a global player that must cooperate with its partners to counteract transnational crimes.¹²

The Commission has intervened on the topic too, stressing that "societies based on common values such as good governance, democracy, the rule of law, and respect for human rights will be more effective in preventing domestic threats to their own security as well as more able and willing to cooperate against common international threats."¹³ In this regard, many policy instruments have been defined: *inter alia*, one should consider bilateral agreements,¹⁴ the enlargement and pre-accession process,¹⁵ European Neighbourhood Policy

10 European Council, "The Hague Programme: Strengthening Freedom, Security and Justice in the European Union", available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2005:053:0001:0014:EN:PDF> (accessed 1 July 2016).

11 European Council, "The Stockholm Programme: An Open and Secure Europe Serving and Protecting Citizens", available at [http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52010XG0504\(01\)&from=EN](http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52010XG0504(01)&from=EN) (accessed 1 July 2016).

12 European Council, Conclusions of the European Council, Ypres, 26-27 June 2014, available at <http://www.consilium.europa.eu/en/meetings/european-council/2014/06/26-27/> (accessed 1 July 2016). Truth be told, some references to the external dimension of the AFSJ may be found in the TFEU too. For instance, under Article 78(2)(g), the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures for a common European asylum system comprising partnership and cooperation with third countries for the purpose of managing inflows of people applying for asylum or subsidiary or temporary protection. Under Article 79(3), the Union may conclude agreements with third countries for the readmission to their countries of origin or provenance of third-country nationals who do not or who no longer fulfil the conditions for entry, presence or residence in the territory of one of the Member States. In more general terms, pursuant to Articles 216 to 218, the EU may conclude agreements with third countries or international organizations where the Treaties so provide or where the conclusion of an agreement is necessary in order to achieve one of the objectives referred to in the Treaties or is provided for in a legally binding Union act or is likely to affect common rules or alter their scope.

13 European Commission, Communication: "A Strategy on the External Dimension of the Area of Freedom, Security and Justice", available at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52005DC0491&from=EN> (accessed 1 July 2016).

14 Meaning association or partnership and cooperation agreements, readmission agreements, visa facilitation agreements, and mutual legal assistance and extradition agreements.

15 On the enlargement of the EU, see *The Enlargement of the European Union* (Ed.) Cremona, M. Oxford University Press, 2003, TATHAM, A.F. *Enlargement of the European Union*. Wolters Kluwer, 2009, SADURSKI, W. *Constitutionalism and the Enlargement of Europe*. Oxford University Press, 2012.

Action Plans,¹⁶ forms of regional cooperation,¹⁷ the development policy,¹⁸ external aid programmes,¹⁹ and forms of cooperation with other international organizations.²⁰

In addition to this, operational cooperation must be considered which is based on the development of agreements and working arrangements made by Europol, Eurojust, the European Police College, and the Borders Agency with counterparts in third countries.

This article analyses the cooperation agreements concluded by Europol in order to understand whether there is and what is the trend in this field, and how this affects the growth of the external dimension of the AFSJ, and the role of the EU as a global player in the fight against transnational crime and the protection of human rights.²¹ Therefore, after a swift overview of Europol's competences - especially as far as the external dimension of the AFSJ is concerned - it focuses on the operational and strategic agreements made by the agency with third countries and international organizations in order to assess their impact on this area of EU law and competences.²²

16 See *The European Neighbourhood Policy: Values and Principles* (Ed.) Poli, S. Routledge, 2016.

17 One may think of the Asia-Europe Meeting (ASEM, http://eeas.europa.eu/asem/index_en.htm) and the Euro-Mediterranean Partnership (EUROMED, http://eeas.europa.eu/euromed/index_en.htm) (both accessed 1 July 2016).

18 See CARBONE, M. "La cooperazione allo sviluppo nell'allargamento dell'Unione europea: la dimensione dimenticata", *Rivista italiana di politiche pubbliche*, 2/3, P.233-252, BARTOLONI, E.M. "La cooperazione allo sviluppo dell'Unione europea con Paesi terzi: da politica contro la povertà a cooperazione globale?". *Diritti umani e diritto internazionale*, 8, P.663-668.

19 One may consider the Community Assistance for Reconstruction, Development, and Stabilisation programme (CARDS), which provides assistance to South-Eastern European countries with a view to their access to the EU, the Technical Aid to the Commonwealth of Independent States programme (TACIS), which promotes the transition to a market economy, democracy building, and the rule of law in Eastern Europe and Central Asia States, and the accompanying measures programme (MEDA), which supports third countries of the Mediterranean area in their economic and social reforms.

20 See CREMONA, M. "The Union as a Global Actor: Roles, Models and Identity", *Common Market Law Review*, 41, 2004, P.553-573, BRETHERTON, C. and VOGLER, J. *The European Union as a Global Actor*. Routledge, 2006.

21 However, the external dimension of the AFSJ is not limited to police and judicial cooperation in criminal matters. It covers other issues too, first of all the management of migration flows. On this topic, see RIJPM, J.J. and CREMONA, M. *The Extra-Territorialisation of EU Migration Policies and the Rule of Law*. European University Institute, 2007, CREMONA, M. *Circular Migration: A Legal Perspective*. European University Institute, 2008, STERKX, S. "The External Dimension of EU Asylum and Migration Policy: Expanding Fortress Europe?". *Europe's Global Role: External Policies of the European Union* (Ed.) Orbie, J. Burlington, 2009, P. 117-139. With regard to the external dimension of the judicial cooperation in civil matters, see HIX, J.P. "Mixed Agreements in the Field of Judicial Cooperation in Civil Matters: Treaty-Making and Legal Effects". *Justice, Liberty, Security: New Challenges for EU External Relations* (Eds.) Martenczuk, B. and van Thiel, S. VUBPress, 2008, P.211-256, KUIJPER, P.J. "The Opinion on the Lugano Convention and the Implied External Relations Powers of the European Community". *Justice, Liberty, Security: New Challenges for EU External Relations* (Eds.) Martenczuk, B. and van Thiel, S. VUBPress, 2008, P.187-210, VAN LOON, H. and SCHULZ, A. "The European Community and the Hague Conference on Private International Law". *Justice, Liberty, Security: New Challenges for EU External Relations* (Eds.) Martenczuk, B. and van Thiel, S. VUBPress, 2008, P.257-299.

22 The difference between the two classes of agreements is that operational agreements provide a legal framework for the exchange of personal data while strategic agreements do not provide anything about it.

2. The role of Europol in the development of the external dimension of the AFSJ.

The European Police Office, better known as Europol, was established as an intergovernmental body with legal personality in 1995 through a convention made between the EU Member States.²³ The convention aimed at improving the effectiveness of cooperation between national police departments in order to prevent and fight against serious forms of transnational crime. It was later replaced by Council Decision 2009/371/JHA and Europol was reformed, becoming an EU agency in 2010.²⁴ The Council Decision has been repealed by Regulation 2016/794²⁵ which has set up a legal framework consistent with Article 88 of the TFEU. In fact, the Treaty of Lisbon has had an impact on Europol, too: Pursuant to Article 88 of the TFEU, Europol shall support and strengthen action by the Member States' police authorities and other law enforcement services, as well as their mutual cooperation in preventing and combating serious crimes affecting two or more Member States, terrorism, and forms of crime which affect a common interest covered by a Union policy. In this regard, the European Parliament and the Council, by means of regulations adopted in accordance with the ordinary legislative procedure, shall determine Europol's structure, operation, field of action, and tasks, which include the collection, storage, processing, analysis, and exchange of information, in particular those forwarded by the authorities of the Member States or third countries or bodies and the coordination, organization, and implementation of investigative and operational action carried out jointly with the Member States' competent authorities or in the context of joint investigative teams.

23 See Council Act 95/C 316/01 of 26 July 1995 drawing up the Convention based on Article K.3 of the Treaty on European Union, on the establishment of a European Police Office (Europol Convention), O.J. C 316 of 27 November 1995, 1. The Convention came into force on 1 October 1998 but Europol was preceded by the Europol Drugs Unit which was a non-operational team for the exchange and analysis of data and information on illicit drug trafficking, trafficking in radioactive and nuclear substances, clandestine immigration networks, trafficking in human beings, illicit vehicle trafficking, and the criminal organizations involved in these kinds of behaviour and associated money-laundering activities. The Unit was replaced by Europol starting from 1 July 1999. In this regard, see Joint Action 95/73/JHA of 10 March 1995 adopted by the Council on the basis of Article K.3 of the Treaty on the European Union concerning the Europol Drugs Unit, O.J. L 62 of 20 March 1995, 1, and Joint Action 96/748/JHA of 16 December 1996 adopted by the Council on the basis of Article K.3 of the Treaty on the European Union extending the mandate given to the Europol Drugs Unit, O.J. L 342 of 31 December 1996, 4.

24 See Council Decision 2009/371/JHA of 6 April 2009 establishing the European Police Office (Europol), O.J. L 121 of 15 May 2009, 37. On Europol, see BOSCHI ORLANDINI, F. "Evoluzione e prospettive della cooperazione di polizia nell'Unione europea: la convenzione Europol". *Diritto pubblico comparato ed europeo*, 3, P.1099-1120, MAROTTA, E. "Role and Action of Europol in Combating Organized Crime". *The European Union and the Challenge of Transnational Organized Crime. Towards a Common Police and Judicial Approach* (Ed.) Longo, F. Giuffrè editore, 2002, P.109, DI FABIO, R. "Il ruolo dell'Europol nello spazio di libertà, sicurezza e giustizia", *La comunità internazionale*, 60, P.677-696, HEINE, G. "Changes in Criminal Law and Cooperation Through, in Particular, the Schengen Agreement and Europol: Possibilities, Problems and Influence in States Outside the European Union". *Harmonization of Criminal Law in Europe* (Eds.) HUSABØ, E.J. and STRANDBAKKEN, A. Intersentia, 2005, P.41-52, CHITI, E. "La riforma di Europol", *Rivista trimestrale di diritto pubblico*, 2009, P.857-859, MAROTTA, E. "Europol e la decisione del 2009". *La cooperazione di polizia e giudiziaria in materia penale nell'Unione europea dopo il Trattato di Lisbona* (Ed.) RAFARACI, T. Giuffrè editore, 2011, P. 271-281.

25 Regulation (EU) 2016/794 of the European Parliament and of the Council of 11 May 2016 on the European Union Agency for Law Enforcement Cooperation (Europol) and replacing and repealing Council Decisions 2009/371/JHA, 2009/934/JHA, 2009/935/JHA, 2009/936/JHA and 2009/968/JHA, O.J. L 135 of 24 May 2016, 53.

Under the 2016 Regulation, among the criminal offences Europol's competence shall cover, there is terrorism, organized crime, unlawful drug trafficking, trafficking of human beings, illegal money-laundering activities, computer crime, corruption, illicit trafficking in arms, and environmental crime. The regulation provides that the Agency shall collect and exchange information and intelligence, notify the competent authorities of the Member States of information concerning them, and aid investigations in the Member States. It shall ask the competent authorities to initiate, conduct or coordinate investigations, and participate in the activities of joint investigation teams. It must be noted that Europol shall also act as the central office for combating euro counterfeiting.²⁶

Under Articles 23 and 25 of Regulation 2016/794, Europol may establish and maintain cooperative relations with third countries and international organizations, and conclude agreements with them which may concern the exchange of all information that may be relevant for the performance of Europol's task, including personal data.²⁷ Pursuant to Article 71(2), the new Regulation shall not affect the legal force of agreements concluded by Europol as established by Decision 2009/371 before 13 June 2016, or of agreements concluded by Europol as established by the Europol Convention before 1 January 2010.

In this regard, one may recall Decision 2000/C 106/1²⁸ which provided that the director of Europol could enter into agreements with third countries and international organizations, and the agreements could contain provisions concerning the receipt of data by the agency, the type of data to be transmitted, the purpose for which the data were to be transmitted or used, and confidentiality. The decision also identified the first group of States and organizations with which negotiations could be entered into. The list included the United States of America, Canada, the Russian Federation, Turkey, countries that would later become part of the EU (for instance, Estonia, Latvia, Lithuania, Poland, Czech Republic), and organizations such as Interpol. Other entities were added to the list later²⁹ and the original decision was replaced by Decision 2009/935.³⁰

26 See Council Decision 2005/511/JHA of 12 July 2005 on protecting the euro against counterfeiting, by designating Europol as the Central Office for combating euro counterfeiting, O.J. L 185 of 16 July 2005, 35.

27 Pursuant to Article 25(1)(a)(b)(c), Europol may transfer personal data to an authority of a third country or to an international organisation, insofar as such transfer is necessary for the performance of Europol's tasks, on the basis of a decision of the Commission adopted in accordance with Article 36 of Directive (EU) 2016/680, finding that the third country or a territory or a processing sector within that third country or the international organisation in question ensures an adequate level of protection ('adequacy decision'), an international agreement concluded between the Union and that third country or international organisation pursuant to Article 218 TFEU adducing adequate safeguards with respect to the protection of privacy and fundamental rights and freedoms of individuals or a cooperation agreement allowing for the exchange of personal data concluded, before 1 May 2017, between Europol and that third country or international organisation in accordance with Article 23 of Decision 2009/371/JHA. In this regard, see Articles 5 and 6 of Council Decision 2009/934/JHA of 30 November 2009 adopting the implementing rules governing Europol's relations with partners, including the exchange of personal data and classified information, O.J. L 325 of 11 December 2009, 6, which provided that the EU Council, acting by qualified majority after consulting the European Parliament and Europol's Management Board, shall determine a list of third countries and international organizations and adopt implementing rules governing the relations of Europol with them.

28 Council Decision 2000/C 106/1 authorising the Director of Europol to enter into negotiations on agreements with third States and non-EU-related bodies, O.J. C 106 of 13 April 2000, 1.

29 See Council Decision 2001/C 358/01 of 6 December 2001 amending the Council Decision of 27 March 2000 authorising the Director of Europol to enter into negotiations on agreements with third States and non-EU-related bodies, O.J. C 358 of 15 December 2001, 1 and Council Decision

3. The operational agreements between Europol and third States

Over time, Europol has concluded operational agreements with Albania, Australia, Canada, Colombia, Macedonia, Iceland, Moldova, Montenegro, Norway, Serbia, Switzerland, Liechtenstein, Monaco, and the United States of America.³¹

The purpose of these agreements is to establish cooperative relations between Europol and those States in order to support both the EU Member States and third countries in their fight against transnational crime. That is why the Parties agree to exchange specialist knowledge, general situation reports, results of strategic analysis, information on criminal investigation procedures, information on crime prevention methods, and to participate in training activities and provide advice and support in individual criminal investigations.

In the agreement with the United States of America the definitions of strategic information and technical information are provided. By strategic information the Parties mean enforcement actions that might be useful to suppress offences, new methods used in committing offences, trends and developments in the methods used to commit offences, observations and findings resulting from the successful application of new enforcement aids and techniques, routes and changes in routes used by smugglers or those involved in illicit trafficking offences covered by the agreement, prevention strategies and methods for management to select law enforcement priorities, and threat assessments and crime situation reports. By technical information the Parties mean means of strengthening administrative and enforcement structures in the fields covered by the agreement, forensic police methods and investigative procedures, methods of training the officials concerned, criminal intelligence analytical methods, and identification of law enforcement expertise.

Every State shall designate a national contact point,³² which shall keep the relations between Europol and competent authorities at a national level. This includes the obligation to regularly organize meetings between Europol and national authorities in order to discuss issues related to the agreement and cooperation in general, the obligation to regularly consult on issues of common interest, and the possibility of inviting a representative of the national contact point to attend the meetings of the Heads of Europol National Units – but this is something only the agreements with Albania, Moldova, Montenegro, Serbia, and

2005/629/EC of 24 February 2005 amending the Decision of 27 March 2000 authorising the Director of Europol to enter into negotiations on agreements with third States and non-EU-related bodies, O.J. L 56 of 2 March 2005, 14.

30 See **Council Decision 2009/935/JHA of 30 November 2009 determining the list of third States and organisations with which Europol shall conclude agreements, O.J. L 325 of 11 December 2009, 12** and Council Implementing Decision 2014/629/EU of 6 May 2014 amending Decision 2009/935/JHA as regards the list of third States and organisations with which Europol shall conclude agreements, O.J. L 138 of 13 May 2014, 104.

31 In light of its provisions, one may believe that the agreement with the United States of America is a strategic agreement rather than an operational agreement, but it should be considered that Europol and the United States have entered into a supplemental agreement on the exchange of personal data and linked information. The texts of all the agreements mentioned in this article are available at <https://www.europol.europa.eu/content/page/external-cooperation-31> (accessed 1 July 2016).

32 For example, the Federal Police for Australia, the Commissioner of the Royal Mounted Police for Canada, the National police for Colombia.

Liechtenstein provide for. It is also agreed to implement forms of secondment of liaison officers.

Exchange of information is paramount: The Parties shall set up appropriate mechanisms in order to control and assess their sources and the reliability of the information obtained, as well as limit the use, storage, review, correction, and deletion of this information. Also, they shall ensure that the information is protected through technical and organizational measures and may establish confidential communication lines (in regards to the agreements with Albania, Moldova, Montenegro, Serbia, and Liechtenstein). Also, personal data relating to an identified natural person or a natural person which is identifiable by reference, *inter alia*, to an identification number or to factors specific to his physical, physiological, mental, economic, cultural, or social identity can be transmitted only where strictly necessary and provided that the relevant purpose be disclosed. The agreements with Australia, Canada, Colombia, Iceland, Macedonia, Monaco, Norway, and Switzerland provide that personal data - as defined in Article 6, first sentence, of the Council of Europe Convention of 28 January 1981 for the protection of individuals with regard to automatic processing of personal data³³ - shall only be supplied by Europol in absolutely necessary cases and in addition to other information.

For what concerns other forms of cooperation, the Parties may establish analysis groups - under the agreements with Albania, Colombia, Macedonia, Moldova, Montenegro, Serbia, Liechtenstein, and Monaco - and joint investigation teams - under the agreements with Albania, Moldova, Montenegro, Serbia, and Liechtenstein).

Pursuant to the agreement with Canada, a request for cooperation may be refused if it is not submitted in conformity with the provisions of the agreement, contrary to domestic law, inconsistent with constitutional requirements, prejudicial to national security, contrary to other government interests, or when compliance would entail extraordinary or excessive cost.

With regard to the exchange of classified information, the agreements with Colombia and Macedonia provide that the Parties shall have security organizations and security programmes and apply the *need to know* principle, meaning that access to and possession of information shall be restricted to those persons who by reason of their duties and obligations need to be acquainted with the information. They shall need security clearance and appropriate authorisation before they can access the information. Reproduction of the information shall be limited to what is strictly necessary and transmission shall be subject to strict requirements. When they are no longer needed, classified documents shall be destroyed in a manner sufficient to preclude recognition or reconstruction of the classified information. Where unauthorised persons have obtained classified information, the Parties shall notify each other without delay and carry on investigation activities.

Under the agreements with Albania and Liechtenstein, Europol has to comply with the Charter of Fundamental Rights of the EU while the States have to comply with international conventions on human rights, most of all the European Convention on Human Rights. The agreements with Moldova, Montenegro, and Serbia only refer to the obligations Europol has to comply with under the Charter.

33 Meaning personal data revealing racial origin, political opinions, or religious or other beliefs, as well as personal data concerning health or sexual life.

Also, under the agreements with Albania, Liechtenstein, Moldova, Montenegro, and Norway, the Parties shall only supply information to each other which was collected, stored, and transmitted in accordance with their respective legal framework and has not been manifestly obtained in violation of human rights.

4. The strategic agreements between Europol and third States

To date, four strategic agreements with the Russian Federation, Turkey, Bosnia and Herzegovina, and Ukraine have been signed. These agreements provide that the Parties shall enhance their cooperation in order to prevent, detect, suppress, and investigate serious forms of transnational crime. That shall be done by exchanging strategic and technical information on forms, methods and means of committing offenses, new types of drugs, technologies and materials used to produce drugs, methods for the examination and identification of drugs, channels for transferring illegally acquired funds, new forms and methods of combating crime, forensic police and investigating methods, training methods and centres of excellence, and criteria for the evaluation of law enforcement activities. The agreement concluded with the Russian Federation expressly states that it does not include the exchange of personal data as that issue shall be tackled in a separate agreement.

Each State shall designate the national authorities responsible for the implementation of the agreement and for making contact with Europol.³⁴ The Parties shall assist each other and can set up the exchange of experts for training purposes. However, the agreement with the Russian Federation provides that a request for assistance may be denied completely or partially when its execution may damage the sovereignty, security, public order or other essential interests of the Federation, or contradict its legislation or international obligations, or when Europol considers that the execution of the request conflicts with its purposes and tasks.

The Parties are expected to keep the information exchanged confidential. In this regard, the most interesting agreement is the one concluded with Ukraine. In fact, in Annex I, one can find provisions concerning the exchange of classified information which resemble the ones of the operational agreements with Colombia and Macedonia.

5. The operational and strategic agreements between Europol and international organizations

At the time being, Europol has concluded one operational agreement with Interpol and two strategic agreements with the World Customs Organization and the United Nations Office on Drugs and Crime (UNODC). The purpose of these agreements is to establish and maintain cooperation in combating serious forms of transnational crime, but the means tend to change and be more specific in the case of the operational agreement, and more generic in the case of the strategic agreements.

Under the operational agreement, Europol and Interpol have agreed to exchange operational, strategic, and technical information, to coordinate their activities, including the

³⁴ They are the Ministry of Internal Affairs of the Russian Federation, the Interpol Department at the Ministry of Interior of Turkey, the Ministry of Security of Bosnia and Herzegovina and the Ministry of Internal Affairs of Ukraine.

development of common standards, action plans, training and scientific research, and the secondment of liaison officers.

Pursuant to Article 5(2), neither Party may process information which has clearly been obtained in obvious violation of human rights. Under Article 7, interested subjects shall have the right to have access to data transmitted under the agreement, or to have such data checked. Pursuant to Article 9, the Parties shall set up and follow specific procedures in order to assess their sources and the reliability of the information obtained.

For what concerns the strategic agreements, they provide for mutual consultation, exchange of information, and reciprocal representation at meetings organized by the Parties. The agreement concluded with UNODC also provides for the establishment of specific forms of technical cooperation which will be mutually agreed upon on a case-by-case basis.

6. Conclusion

In a globalized world, where threats to the values and the very existence of European democracies come both from inside and outside Europe, the establishment of an external dimension of the AFSJ must be regarded as a positive result as it is necessary to complete the corresponding internal dimension. Therefore, one may say that the very idea of the external dimension of the AFSJ is consistent with the objectives of the EU, as it contributes to achieving them. Also, one cannot deny that the commitment shown by the EU in fighting against transnational crime enhances the role played by the EU itself on the international stage as a leading actor in this kind of matter.³⁵

Thus, one should have a positive opinion of the initiatives taken so far by Europol with regard to the conclusion of operational and strategic agreements, and with regard to the agreements that will be concluded in the future. In fact, one may consider, for instance, that on 12 April 2016 the European Parliament approved the draft Council implementing decision on the conclusion of a strategic cooperation agreement with the Federative Republic of Brazil:³⁶ So, the process of building a global network of allies against common threats goes on. Of course, for what concerns the countries listed in the 2009 decision, one should be aware that the agreements with China, Israel, and Morocco still lacks, but, in light of what has already been achieved especially in terms of exchange of information,³⁷ one might be optimistic.

However, there are some critical issues that should be highlighted. First, one should consider that a model agreement has been drawn up by Europol and the Europol Joint Supervisory Body³⁸ but that it tends not to be fully complied with because of the many needs which may be taken to the table during negotiations: So, one could not find two

35 CREMONA, M. "The European Union as an International Actor: Issues of Flexibility and Linkage", *European Foreign Affairs Review*, 3, P.67-94, MONAR, J. "The EU as an International Actor in the Domain of Justice and Home Affairs", *European Foreign Affairs Review*, 9, P.395-415.

36 See European Parliament legislative resolution of 12 April 2016 on the draft Council implementing decision approving the conclusion by the European Police Office (Europol) of the Agreement on Strategic Cooperation between the Federative Republic of Brazil and Europol, available at <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2016-0098+0+DOC+XML+V0//EN&language=EN> (accessed 1 July 2016).

37 In this regard, Europol has provided some data which are quite positive. See for instance <https://www.europol.europa.eu/content/page/siena-1849> (accessed 1 July 2016).

38 This body's task is to supervise personal data protection and ensure that Europol complies with the relevant legal provisions. See <http://www.europoljsb.europa.eu/about.aspx> (accessed 1 July 2016).

agreements similar to each other. Making use of a wording developed in other areas of EU law, one may speak of a sort of variable-geometry collaboration that makes it difficult to identify a coherent system of cooperation between Europol and its partners. As a matter of fact, one would have better to acknowledge the existence of many systems, one for each partner. It is quite likely that this kind of problem is an unsolvable one since the agreements are based on mutual concessions. Therefore, if one has to choose between leaving the negotiation table empty-handed and leaving it with something, the latter option is surely the most preferable one.

Yet, there is another issue that must be taken into account: The role protection of human rights plays in the agreements. As it has already been underlined, under the agreements with Albania and Liechtenstein, on the one hand Europol has to comply with the Charter of Fundamental Rights of the EU, and on the other hand the States have to comply with international conventions on human rights; while the agreements with Moldova, Montenegro, and Serbia only refer to the obligations Europol has to comply with under the Charter. Also, under the agreements with Albania, Liechtenstein, Moldova, Montenegro, and Norway, the Parties cannot supply information which has been manifestly obtained in violation of human rights. For what concerns the strategic agreements, one can find an implicit reference to the protection of human rights in the agreements with Turkey and the Russian Federation.³⁹ With regard to the agreements with international organizations, the agreements concluded with Interpol refers to the preamble to the Universal Declaration of Human Rights while also prohibiting the processing of information obtained in obvious violations of human rights.

It is self-evident that that is not enough. Of course, from a strictly legal point of view, the consequences are not so serious. Regardless of the express reference to the Charter of Fundamental Rights, Europol still has to comply with its provisions pursuant to Article 51(1) of the Charter itself,⁴⁰ as the States have to protect the fundamental rights guaranteed by their constitutions, by international conventions to which they are party, and by *jus cogens*. Likewise, international organizations have to comply with the obligations arising from the *ius cogens* and their founding treaties. However, since exchange of information is paramount in all the agreements⁴¹ and the external dimension of the AFSJ should be regarded as a means to spread the values of the EU worldwide, it does not seem appropriate to omit such a reference. Actually, it should be seen - at least for what concerns Europol - as a reassertion of those values and the expression of a form of awareness: That, even when it come to the

39 The agreements provide that the Parties shall cooperate in accordance with the provisions of the agreements provided that Europol acts within its legal framework and the States observe their national legislation and international obligations.

40 Under Article 51(1), the provisions of the Charter are addressed to the institutions and bodies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles, and promote the application of the Charter in accordance with their respective powers. On the Charter of Fundamental Rights of the EU, see generally *Making the Charter of Fundamental Rights a Living Instruments* (Ed.) Palmisano, G. Brill Nijhoff, 2014, *The EU Charter of Fundamental Rights: A Commentary* (Eds.) Peers, S., Hervey, T., Kenner, J. and Ward, A. Hart Publishing, 2014, *The EU Charter of Fundamental Rights as a Binding Instrument: Five Years Old and Growing* (Eds.) de Vries, S., Bernitz, U. and Weatherill, S. Hart Publishing, 2015.

41 For an introduction, see *European Data Protection: Coming of Age* (Eds.) Gutwirth, S., Leenes, R., de Hert, P. and Poulet, Y. Springer, 2014, *Reforming European Data Protection Law* (Eds.) Gutwirth, S., Leenes, R. and de Hert, P. Springer, 2015.

fight against terrorists or traffickers of human beings, drugs and arms, the EU is always driven by the very idea of protection of fundamental rights, rather than the fight itself.